BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Report on Universal Postal Service and the Postal Monopoly **Docket No. PI2008-3**

REPLY COMMENTS OF PITNEY BOWES INC. IN RESPONSE TO NOTICE OF REQUEST FOR COMMENTS ON UNIVERSAL POSTAL SERVICE AND THE POSTAL MONOPOLY

James Pierce Myers
Attorney at Law
1617 Courtland Road
Alexandria, Virginia 22306
Telephone: (571) 257-7622
Facsimile: (571) 257-7623
E-Mail: jpm@piercemyers.com

Michael F. Scanlon
Christopher J. Hopfensperger
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 778-9000
Facsimile: (202) 778-9100
E-Mail: michael.scanlon@klgates.com

Counsel to PITNEY BOWES INC.

DATED: August 1, 2008

TABLE OF CONTENTS

I. INTRODUCTION

Pitney Bowes Inc. (Pitney Bowes) submitted initial comments in response to the Postal Regulatory Commission's Notice of Request for Comments on Universal Postal Service and the Postal Monopoly Laws (Docket No. PI2008-3), on June 30, 2008. These reply comments discuss topics addressed by others in their initial comments.

II. DISCUSSION

A. Support for a Flexible Definition of "Universal Postal Service"

Today, the Postal Service faces a number of unique challenges and uncertainties, including a decline in mail volumes across all mail classes, rising fuel costs and other inflationary pressures, a national economy in stress, and the imposition of a new regulatory price cap for market dominant products. In light of these circumstances, Pitney Bowes continues to caution against prescribing a detailed, rigid definition of "universal postal service." While Pitney Bowes would strongly oppose any degradation of service performance from existing service levels, the Postal Service must have the flexibility to respond quickly to the changing needs and requirements of mailers and mail recipients alike.

Numerous commenters recommend that the Commission establish a flexible, customer-oriented definition of "universal postal service." Such a definition is necessary in order to promote the operational and pricing flexibility afforded to the Postal Service under the PAEA.[1] As noted in the MOAA comments, "[n]ow is not the time to adopt rigid rules, and particularly, rigid statutory provisions that would define the precise scope of the Postal Service's obligations, most importantly including precise standards

[1] *See* Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006).

governing delivery of mail." MOAA Comments at 1; s*ee also* NPPC/FSR Comments at 2; PostCom/DMA Comments at 17; Time Warner Comments at 7.

B. The Importance of the Postal Monopolies

In its initial comments, Pitney Bowes also cautioned against any change at this time to the two postal monopolies recognized in Section 702 of the PAEA – "the monopoly on the delivery of mail" and the monopoly "on access to mailboxes." Pitney Bowes Comments at 12. Numerous other commenters agree that changing the two postal monopolies would be premature and ill-advised. *See* ABM Comments at 10; ANM Comments at 6-7; APWU Comments at 5; Conde Nast Comments at 1; MMA Comments at 5; MPA Comments at 2; NAPM Comments at 6; NPPC/FSR Comments at 2; PSA at 2; PostCom/DMA Comments at 2; Time Warner Comments at 7; USPS Comments at 29; ValPak Comments at 7.

Two common themes emerge from these comments. First, the existing postal monopolies have served the Postal Service, postal customers, the mailing industry, and the Nation well. Over the years, the statutory monopoly and the mailbox monopoly have each helped to promote and sustain mail as a vital communications medium, enabling it to survive for more than 200 years and further the Congressional purpose to "bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a).

Second, there is too much current uncertainty to justify any change to the monopolies. Postal liberalization in other markets is still unfolding, and the lessons that may be learned from these experiences have yet to be fully examined and understood. While the Commission has successfully created a new regulatory architecture for the U.S.

postal system, the implementation of the PAEA is still incomplete. And the economic challenges currently facing the Postal Service and the mailing community are significant.

With respect to the mailbox monopoly in particular, the Postal Service's exclusive access to the mailbox preserves the privacy and integrity of the mail and is intrinsic to mail's value as a communications and delivery medium. *See* NALC Comments at 12. Mail security is an essential component of quality of service. The existing mailbox monopoly affords both senders and recipients of the mail the assurance that items of significant personal value, such as financial instruments (e.g., checks, credit cards, and securities) and medical records will be carried and delivered by a highly-trusted federal agency. The Postal Service is appropriately viewed as the guardian of what is carried and delivered through the mail. A relaxation of the mailbox monopoly would introduce a new layer of risk to mail security which would undermine public confidence in the mail.

Accordingly, in the absence of any compelling reason to alter the two postal monopolies, the Commission should seek to "do no harm."

C. Expanding Retail Access to Postal Services

Numerous parties also recognize the importance of expanding the availability and ubiquity of postal services via expanded retail access.[2] *See* MMA Comments at 3; NPPC/FSR Comments at 5-6; Pitney Bowes Comments at 5; USPS Comments at 20. Expanded retail access will increase the value of the mail by: promoting efficiency and reduced costs; encouraging increased mail volumes through enhanced convenience and

[2] Congress also recognized the importance of expanding retail access and in the PAEA required the Postal Service to present plans "to expand and market retail access to postal services, in addition to post offices, including – (1) vending machines; (2) the Internet; (3) postage meters; (4) Stamps by Mail; (5) Postal Service employees on delivery routes; (6) retail facilities in which overhead costs are shared with private businesses and other government agencies; (7) postal kiosks; or (8) any other nonpost office access channel providing market retail access to postal services." PAEA, §302. The Postal Service submitted its plans on June 20, 2008. *See* United States Postal Service, *Postal Accountability and Enhancement Act Section 302 Network Plan* (June 2008).

customer loyalty; promoting further investment in technology and new product development; expanding the benefits and availability of workshare discounts to low-volume mailers; and promoting environmental sustainability initiatives. As noted in the NPPC/FSR Comments, "the costs of retail access can be reduced while maintaining or actually increasing access through technically innovative ways of selling stamps, accepting letters and parcels, and providing other retail services. These solutions are likely to be less expensive, equally convenient, and greener." NPPC/FSR Comments at 5-6.

In addition, the adoption of new technologies will help "enable the Postal Service and its customers collectively to achieve the fundamental goal of the PAEA – realization of the lowest combined costs of the delivery of hard copy information and products to the American people." PostCom/DMA Comments at 16. The Commission, of course, is familiar with past Pitney Bowes' testimony that argued for price incentives to encourage expanded retail access.[3] Pitney Bowes urges the Commission in its Report to encourage the expansion of retail access to postal services, as well as the adoption of incentives to promote that access and new technologies, to enhance mail's value to both consumers and recipients.

D. Enhancing the Efficiency of the Postal System to Ensure Universal, Affordable Postal Services

Several commenters recognize that affordability is a key component of universal postal service and that the Commission and the Postal Service should continue to focus on making the postal system more efficient. *See* APWU Comments at 6; FedEx Comments at 4; GCA Comments at 27; NPPC/FSR Comments at 8; MPA Comments at

[3] *See* Direct Testimony of Lawrence G. Buc on behalf of Pitney Bowes (PB-T-3)(Docket No. R2006-1)(September 6, 2006).

6; Pitney Bowes Comments at 8. While the U.S. postal market now recognizes the value of promoting the lowest combined costs through public-private partnerships and efficient access pricing for upstream services, the Postal Service should further explore other opportunities to increase the productive efficiency of the postal system, including: extending the reach and benefits of targeted workshare discounts to low-volume mailers; expanding workshare opportunities for presort and bulk mailers; and deaveraging rates across a broader range of cost causative characteristics, including shape, postage evidencing, distance and address hygiene.

An efficient postal system that supports affordable rates also requires an efficient processing and transportation network. In that regard, we concur with GCA which points out "[t]he Commission also rightly identified affordable rates as a key element of universal service. But if postal prices are to remain affordable, the Service must be free to manage, and realign, its network efficiently." GCA Comments at 27.

E. The Importance of Service Quality

Numerous commenters acknowledge the importance of consistent, reliable mail services and note the key role of modern service standards in meeting that goal. *See* MPA Comments at 8; NPPC/FSR Comments at 8; Pitney Bowes Comments at 9; PostCom/DMA Comments at 12; USPS Comments at 29.

The Commission's report should emphasize the importance of service quality. While there are inherent trade-offs between service quality and cost, the statutory requirement that the Postal Service and the Commission develop and implement modern service standards and a system of performance measurement for market dominant products is essential to ensure the provision of consistent and reliable postal service

necessary to preserve and "enhance the value of postal services to both senders and recipients."[4] 39 U.S.C. § 3691(b)(1)(A).

F. The Threat to Universal Service Posed by State "Do Not Mail" Initiatives

Numerous parties also recognize the potentially adverse impact of state "do not mail" initiatives on universal postal service and the federal policy objectives of the PAEA. *See* AISOP/SMC Comments at 5; NPPC/FSR Comments at 12; Pitney Bowes Comments at 11; PSA Comments at 7; UPS Comments at 5; USPS Comments at 46. State "do not mail" initiatives, if enacted, would pose significant threats to mail volumes, Postal Service finances, and the Postal Service's ability to provide universal, affordable, quality service. Such laws would also directly undermine the federal policy objective, most recently codified in the PAEA, to promote universal mail service.

The July 10, 2008, hearing testimony of Robert Corn-Revere, Esq. provided an important contribution to the record in this docket.[5] Corn-Revere's testimony highlights the legal tension between such initiatives and the First Amendment, and also discusses circumstances in which a state regulation may be preempted by federal law. Attached as Appendix 1 is a memorandum prepared for Pitney Bowes that addresses a number of related federal preemption issues and discusses why some state "do not mail" initiatives may be held unconstitutional under the federal Supremacy Clause.

[4] Pitney Bowes believes that postal price incentives are necessary to support the broad-based adoption of the Full Service Intelligent Mail barcode (IMb). Any delay in the May 2009 pricing incentives previously announced by the Postal Service would likely erode IMb readiness by discouraging mailers and vendors from making further investments necessary to implement the Full Service IMb. Delayed adoption of the Full Service IMb would, in turn, undermine the value of the Postal Service's proposed system of service performance measurement for First-Class and Standard presort letters.

[5] Testimony of Robert Corn-Revere before the Postal Regulatory Commission, Washington, D.C. (July 10, 2008).

III. CONCLUSION

Pitney Bowes appreciates the Commission's consideration of these reply comments.

Respectfully submitted:

_____/s/_____
James Pierce Myers
Attorney at Law
1617 Courtland Road
Alexandria, Virginia 22306
Telephone: (571) 257-7622
Facsimile: (571) 257-7623
E-Mail: jpm@piercemyers.com

Michael F. Scanlon
Christopher J. Hopfensperger
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 778-9000
Facsimile: (202) 778-9100
E-Mail: michael.scanlon@klgates.com

Counsel to PITNEY BOWES INC.

Appendix 1

K&L | GATES

MEMORANDUM

TO: PITNEY BOWES

FROM: Bruce Heiman
Michael Scanlon

DATE: August 1, 2008

RE: **FEDERAL PREEMPTION OF STATE "DO NOT MAIL" LAWS**

INTRODUCTION AND SUMMARY

Since the ratification of the Constitution through the recent enactment of the Postal Accountability and Enhancement Act of 2006, control over the mails and the postal system has been reserved to the federal government. Congress has enacted laws setting forth a comprehensive and pervasive federal system of regulation. Importantly, Congress created the Post Office Department, then replaced it in 1971 with the United States Postal Service (USPS or Postal Service), directing it to bind the Nation together through nationwide mail service, and requiring it to receive, transmit, and deliver written and printed matter, including the business correspondence of its citizens.

On numerous occasions Congress legislated exceptions as to what the USPS could "receive, transmit, and deliver" when it found it necessary and appropriate to do so. It expressly prohibited the mailing of certain "matter otherwise legally acceptable in the mails." In addition, the Postal Service has issued regulations regarding the mailability of matter, thereby controlling content, size, shape, and weight of what may be mailed. As a result, Congress and the USPS have occupied the field of regulation of non-mailable matter.

A number of states are currently considering the establishment of "do not mail" laws that would attempt to prohibit a commercial mailer from mailing materials otherwise permitted under federal law. These laws, if enacted, would be preempted by federal law.

Perhaps states believe they have authority to prohibit the mailing of certain matter because of the absence of an affirmative federal statement that all matter is mailable unless specifically prohibited by federal law. However, this ignores both the Postal Service's overall mandate regarding the delivery of business correspondence and the pervasive federal regulation of mailable matter.

Nor can the states rely on court decisions that have upheld the power of a state to regulate activities traditionally reserved to the state police powers (e.g., the enforcement of legitimate public health, safety and welfare concerns including fraud, unfair trade practices, and public morals), that are carried out through the mails. Where state regulations affecting the mails and the postal system have been upheld, courts have recognized a distinction between the state regulation of the underlying activity being carried out through the mails, and the general federal control of the mails and the postal system.

Although beyond the scope of this memorandum, state "do not mail" initiatives, if enacted, may also be invalid under established federal supremacy doctrines of frustration of purpose, intergovernmental immunity, and the dormant commerce clause. State "do not mail" laws that impair the Postal Service's ability to fulfill its statutory responsibility to provide universal, affordable mail service, may be invalidated under the "frustration of purpose" doctrine.[1] To the extent that such laws seek to require the Postal Service to take specific action to implement or enforce a state "do not mail" law, they would be invalid under the long line of cases invalidating state laws that result in a "direct, physical interference" with mails.[2] Similarly, state "do not mail" laws that seek to apply different standards for in-state and out-of-state mailers would be invalid under commerce clause jurisprudence.[3]

DISCUSSION

A. Control of the Mails and the Postal System Is Reserved to the Federal Government

1. The U.S. Constitution Gives Congress the Power Over the Postal System and the Mails

Article I, Section 8, of the U.S. Constitution grants Congress the power to "establish Post Offices and post Roads" and the power to "make all laws which shall be necessary and proper" to carry out that power. This power is supreme over the states pursuant to Article VI of the Constitution.

The Constitutionally-created "postal power, like all other enumerated powers of Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution."[4]

---

[1] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (invalidating state law regulating foreign commerce and holding state law is preempted to the extent it conflicts with a federal statute or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citing *United States v. Locke*, 529 U.S. 89, 115, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)).

[2] *See Johnson v. Maryland*, 254 U.S. 51, 57 (1920)(invalidating state license requirements for letter carriers); *USPS v. City of Hollywood, Florida*, 974 F. Supp. 1459, 1463-64 (S.D. Fla. 1997)(invalidating state permit requirements for USPS buildings)(citing a series of cases where courts have relied upon the supremacy clause to preempt local laws in conflict with federal postal laws); *see also Ex parte Jackson*, 96 U.S. 727, 732 (1877); *In re Rapier*, 143 U.S. 110, 133 (1892)). Two cases addressing the manner of mail delivery are instructive. In *United States v. City of St Louis, Branch N. 343*, 597 F.2d 121 (8th Cir. 1979), the court upheld a local "opt-out" ordinance which allowed a postal carrier to cross lawns with the "express or implied consent of the owner or his agent" because the ordinance was consistent with USPS regulations. In contrast, in *USPS v. City of Pittsburg. Cal.*, 661 F.2d 783 (9th Cir. 1981), the court invalidated an "opt-in" ordinance requiring the carrier to obtain advance consent because it conflicted with the USPS regulation.

[3] *See generally, Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994) (general discussion of actionable "discrimination" for purposes of Commerce Clause)(citations omitted).

[4] *See United States Postal Serv. v. Brennan*, 574 F.2d 712, 714 (2d Cir. 1978)(discussing federal postal power and upholding federal governmental monopoly over letter mail)(quoting *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. Ed. 23 (1824)), *cert. denied*, 439 U.S. 1115 (1979)).

The scope of the Congressional postal power has been construed broadly. In *Ex Parte Jackson*, the Supreme Court held:

> [t]he power vested in Congress 'to establish post-offices and post-roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.[5]

The *Jackson* Court also held "the power of Congress is exclusive, its legislation establishing a post-office or post-road, or regulating the receipt, protection, carriage, or delivery of mail, is therefore supreme."[6]

Congress' regulation of the content of the mails is also well-established. In *Ex Parte Rapier*, the Supreme Court held:

> the power vested in congress to establish post-offices and postroads embraced the regulation of the entire postal system of the country, and that under it congress may designate what may be carried in the mail and what may be excluded . . . [and] to refuse the facilities for the distribution of matter deemed injurious by congress to the public morals[.][7]

Courts have consistently recognized that "Congress has the power to regulate the mails" and have specifically recognized the "power of Congress to exclude objectionable and non-constitutionally protected material from the mails."[8]

2. Congress Created the USPS, Directed it to Bind the Nation Through Nationwide Mail Service Including Business Correspondence and Printed Matter

In 1970, Congress passed the Postal Reorganization Act of 1970, which revised and reenacted title 39 of the United States Code in its entirety.[9] The language of title 39 makes clear that Congress intended to reserve control of the mails and the postal system to the federal government through the newly created United States Postal Service. Under the new title, Congress directed that:

---

[5] *Ex parte Jackson*, 96 U.S. 727, 728 (1877)(upholding federal law regulating lotteries).
[6] *Id.*, at 729.
[7] *Ex parte Rapier*, 143 U.S. 110, 113 (1892)(upoholding federal law regulating lotteries)(citing *Ex Parte Jackson*, 96 U.S. 727 (1877)).
[8] *See Reed Enterprises v. Clark*, 278 F. Supp. 372, 376 (D.D.C. 1967), *judgment aff'd*, 390 U.S. 457 (1968)(upholding federal law prohibiting the use of the mails for obscene matter)(citing *Public Clearing House v. Coyne*, 194 U.S. 497, 24 S. Ct. 789, 48 L. Ed. 1092 (1904)(upholding Postmaster General's authority to issue "fraud order" denying privileges of mails).
[9] *See* Pub. L. 91-375, 84 Stat. 719 (Aug. 12 1970).

> The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.[10]

Importantly, Congress specifically designated as a "basic function" the provision of postal services for "business correspondence."[11]

Congress also directed the Postal Service to receive and deliver all mailable matter. Section 403(a) specifically states that the Postal Service "shall plan, develop, promote, and provide adequate and efficient postal services . . . shall receive, transmit, and deliver . . . written and printed matter, parcels, and like materials and . . . shall serve as nearly as practicable the entire population of the United States."[12] Section 404 similarly provides that the Postal Service shall "provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail."[13]

Congress directed that the Postal Service should deliver mailable matter. In *Bowie v. Williams*, the Court construed this obligation to mean that the "Postal Service must deliver the mail unless an item is 'nonmailable'" as defined by federal law.[14]

B. The Comprehensive and Pervasive Scheme of Federal Regulation is Intended to Occupy the Field of Regulation of Nonmailable Matter

A fundamental principle of constitutional law is that Congress has the power to preempt state law.[15] Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[16] Even without an express provision for preemption, courts have found federal preemption where "Congress intends federal law to 'occupy the field.'"[17]

---

[10] 39 U.S.C. § 101(a).
[11] *Id.*
[12] 39 U.S.C. § 403(a).
[13] 39 U.S.C. § 404(a)(1).
[14] 351 F. Supp. 628, 634 (E.D. Pa. 1972)(emphasis added)(denying action by candidate for Congress challenging an incumbent's use of frank mail).
[15] U.S. Const. Art. VI, cl. 2; *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989).
[16] *Gade v. National Solid Waste Mgmt. Assn.*, 505 U.S. 88, 98 (1992)(invalidating state occupational safety and health standards for training hazardous waste where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it")(internal citations omitted).
[17] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)(invalidating state law regulating foreign commerce under Supremacy Clause)(citing *United States v. Locke*, 529 U.S. 89, 115, 120 S.Ct. 1135, 146 L.Ed.2d

As set forth below, Congress and the Postal Service have established a comprehensive and pervasive scheme of federal regulation of what may and may not be carried through the mails. By statute and regulation, federal law identifies certain matter as "nonmailable."[18] Federal regulation of mailable matter is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" and, therefore, has occupied the field.[19]

1. Congressional Regulation of Nonmailable Matter

The federal statutory provisions governing mailability are collected and set forth in chapter 30 of title 39.[20] Chapter 30 establishes general provisions addressing nonmailable matter and specific enumerated exceptions to the federal presumption of mailability. Many of the provisions of chapter 30 are framed as prohibitions of "matter otherwise legally acceptable in the mails."

Matter deemed nonmailable by federal statute includes: (1) matter which exceeds the size and weight limits prescribed for the particular class of mail, or which is of a character perishable within the period required for transportation and delivery;[21] (2) matter which is in the form of, and reasonably could be interpreted or construed as, a bill, invoice, or statement of account due, but which in fact constitutes a solicitation, unless such matter bears a clarifying notice;[22] (3) unsolicited contraceptives or contraceptive advertisement;[23] (4) unsolicited matter that contains a "household substance" that does not comply with the requirements for special child-resistant packaging established for that substance by the Consumer Product Safety Commission;[24] (5) unsealed or unwrapped fragrance advertising samples;[25] (6) advertisements for a product or service that imply Federal Government connection, approval, or endorsement, unless bearing a conspicuous disclaimer;[26] (7) solicitations of information or the contribution of funds or membership fees implying Federal Government connection, approval, or endorsement, unless bearing a conspicuous disclaimer;[27] (8) solicitations for the purchase of or payment for any free product or service provided by the Federal Government, where the solicitation does not contain a notice that the product or service may be obtained for free;[28] (9) motor vehicle master keys;[29]

---

69 (2000)); *see also Felder v. Casey*, 487 U.S. 131, 138 (1989)(invalidating state notice-of-claim requirements as preempted by federal civil rights law); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (invalidating state Alien Registration Act).

[18] *See* 18 U.S.C. §§ 1461, 1463, 1715 to 1717; 39 U.S.C. §§ 3001 *et seq*.; Mailing Standards of the United States Postal Service, USPS Domestic Mail Manual, § 601.

[19] *Felder*, 487 U.S. at 138.

[20] *See* 39 U.S.C. §§ 3001 *et seq*.

[21] *See* 39 U.S.C. § 3001(c)(1).

[22] *See* 39 U.S.C. § 3001(d).

[23] *See* 39 U.S.C. § 3001(e)(1)-(2).

[24] *See* 39 U.S.C. § 3001(f).

[25] *See* 39 U.S.C. § 3001(g).

[26] *See* 39 U.S.C. § 3001(h).

[27] *See* 39 U.S.C. § 3001(i).

[28] *See* 39 U.S.C. § 3001(j).

[29] *See* 39 U.S.C. § 3002.

(11) locksmithing devices;[30] (12) mail bearing a fictitious name or address;[31] (13) false representations and lotteries;[32] (14) pandering advertisements;[33] (15) mailing of unordered merchandise;[34] (16) mailing of sexually oriented advertisements;[35] (17) nonmailable plants;[36] (18) nonmailable plant pests and injurious animals;[37] (19) skill contests or sweepstakes;[38] and (20) hazardous materials.[39] All of this matter is deemed nonmailable by federal statute or regulation. Also, mailing certain matter is punishable under various federal criminal statutes.[40]

Although Congress has had ample opportunities to enact a federal "do not mail" provision broadly regulating advertising and direct marketing mail, Congress has not done so.[41] In fact, where Congress has addressed related issues with respect to advertising mail and unsolicited mail, Congress has deliberately and repeatedly prohibited only a much narrower subset of mail.

2. Postal Service Regulation of Nonmailable Matter

The Postal Service's Domestic Mail Manual, incorporated by reference into the Code of Federal Regulations,[42] contains general mailability standards.[43] The postal regulations, issued pursuant to Congress' delegated authority to the Postal Service, establish detailed specifications of the physical dimensions of mailable matter and standards prohibiting potentially harmful matter from the mails.

---

[30] *See* 39 U.S.C. § 3002a.
[31] *See* 39 U.S.C. § 3003.
[32] *See* 39 U.S.C. § 3005.
[33] *See* 39 U.S.C. § 3008.
[34] *See* 39 U.S.C. § 3009.
[35] *See* 39 U.S.C. § 3010.
[36] *See* 39 U.S.C. § 3014.
[37] *See* 39 U.S.C. § 3015.
[38] *See* 39 U.S.C. § 3017.
[39] *See* 39 U.S.C. § 3018.
[40] *See* 39 U.S.C. § 3001(a), referencing 7 U.S.C. § 2156 and 18 U.S.C. §§ 1302, 1341, 1342, 1461, 1463, and 1715 to 1717. Federal criminal statutes provide that the following matters may not be mailed: (1) "obscene, lewd, lascivious, indecent, filthy or vile" articles, matter, things, devices, or substances, *see* 18 U.S.C. §1461, (2) articles or things designed, adapted, or intended for producing abortion or for any "indecent or immoral use," as well as advertisements and promotional materials for abortion services or products, *see id*., (3) otherwise mailable matter with delineations, epithets, terms, or language of an "indecent, lewd, lascivious, or obscene character" on the envelope or wrapper, or on a post card, *see* 18 U.S.C. §1463, (4) pistols, revolvers, and other firearms capable of being concealed on the person, with certain exceptions for military use, *see* 18 U.S.C. §1715, (5) poisons, poisonous animals, insects, and reptiles, explosives, inflammable materials, germs, and injurious matter, *see* 18 U.S.C. §1716(a), with certain exceptions, *see* 18 U.S.C. §§1716(b) and 1716(e), (6) any alcohol, including beer and wine, *see* 18 U.S.C. §1716(f), (7) with certain exceptions, switchblades and other folding knives, *see* 18 U.S.C. §1716(g), (8) advertising, promotional, or sales matter for nonmailable poisons, explosives, germs, alcohol, knives, etc., *see* 18 U.S.C. §1716(h), and (9) documents that violate specified criminal statutes, *see* 18 U.S.C. §§ 499, 506, 793, 794, 915, 954, 955, 957, 960, 964, 1017, 1542-44, and 2388, or which contain any matter advocating or urging treason, insurrection, or forcible resistance to any federal law, *see* 18 U.S.C. § 1717.
[41] *See Rowan v. United States*, 397 U.S. 728, 736-37 (1970)(construing predecessor federal provision restricting pandering advertisements).
[42] *See* 39 C.F.R. §§ 111.1, 111.4 (2007).
[43] *See* Mailing Standards of the United States Postal Service, USPS Domestic Mail Manual, § 601.

Postal Service regulations set forth general mailability standards establishing that "[a]rticles presented for mailing must be prepared under the general and specific standards" and that "USPS accepts properly packaged and marked parcels but reserves the right to refuse nonmailable or improperly packaged articles or substances."[44] Postal Service regulations further provide that "[t]he basic premise of the postal mailability statutes is that anything "which may kill or injure another, or injure the mails or other property" is nonmailable."[45]

Postal Service regulations categorize "nonmailable" matter into four groups: restricted matter, harmful matter, hazardous materials, and other nonmailable matter.[46] "Restricted matter" includes articles or substances prohibited or limited by Title 18, U.S. Code (liquors, abortive and contraceptive devices, odd-shaped items in envelopes, motor vehicle master keys, and locksmithing devices).[47] "Restrictive matter" also includes matter that is restricted by 18 U.S.C. § 1716(a) because it may, under conditions encountered in the mail, be injurious to life, health, or property (obnoxious odors, liquids, powders, and battery-powered devices).[48] "Harmful matter" includes any article that can kill or injure another or injure the mail or other property (poisons, controlled substances, poisonous animals and insects, certain biomedical material, explosives, flammable chemicals and devices).[49] "Hazardous materials" include materials that are likely to harm USPS employees or to destroy, deface, or otherwise damage mail or postal equipment (caustic poisons, acids, flammable liquids and gases, other unstable materials, explosives, radioactive materials, or articles emitting obnoxious odors).[50] "Other nonmailable matter" is a catch-all category for any matter that is undeliverable because of an illegible, incorrect, or insufficient address, or when it does not meet USPS standards for mail preparation, classification, postage rates, size, or weight.[51]

C. State Laws That Regulate Mail Matter Are Preempted By Federal Law

The federal statutory and regulatory restrictions on mailable matter evidence a comprehensive and pervasive scheme that matter is mailable unless specifically prohibited. The relevant decisional law further confirms that federal law occupies the field of regulation of mail matter.

Nevertheless, numerous states are actively considering, or have introduced, "do not mail" laws that would prohibit commercial mailers from sending marketing mail otherwise permitted under federal law.[52] The legislative proposals vary from state to state. Some of the laws purport

[44] Mailing Standards of the United States Postal Service, USPS Domestic Mail Manual, § 601.1.6.
[45] *Id.*, at § 601.8.1.
[46] *See id.*, at §§ 601.8.3-6.
[47] *See id.*, at § 601.8.4.
[48] *See id.*
[49] *See id.*, at § 601.8.5.
[50] *See id.*, at § 601.8.6.
[51] *See id.*, at § 601.8.3.
[52] States that have recently considered "do not mail" legislation include: Arkansas, Colorado, Connecticut, Hawaii, Maryland, Michigan, Missouri, Montana, New Jersey, New York, North Carolina, Rhode Island, Texas, Vermont, and Washington.

to protect citizens from deceptive or fraudulent direct mail advertising, others assert environmental concerns, while still others claim privacy interests or generalized consumer convenience. But in reality the clear effect of these laws is to regulate mail matter and, therefore, they are preempted by federal law.

1. Courts have Consistently Held that the Determination of "Mailability" Under Existing Law is Reserved Exclusively to Federal Law and the Postal Service

The decisional law addressing "mailability" has consistently held that: "a determination of 'mailability' under existing law of long standing is solely for the postal department. It alone has the power to make such a determination[,]"[53] and that "there is little doubt that the federal statutory scheme for handling, delivering, and sorting the mails is comprehensive. The United States Postal Service may determine whether matter is nonmailable under statutory guidelines . . . the state may not regulate the mail[.]"[54]

2. The Relevant Decisional Law Distinguishes the Power of a State to Regulate Activities Within Its Authority and the Federal Power Over the Mails

Where state regulations affecting the mails and the postal system have been upheld, courts have based their decisions on a clear distinction between the federal regulation of the mails and state regulation of activities that implicate public health, safety and welfare concerns traditionally reserved to state police powers which happen to be carried out through the mails. Thus, in *State ex inf. Danforth v. Reader's Digest Assoc., Inc,* the Court held, "while it is true [that] the state is without power to regulate the mail, it is not powerless to prevent . . . unfair trade practices" or other fraudulent activities perpetrated through the mails.[55]

Similarly, Courts have upheld state regulation of public morals. The seminal case is *Roth v. United States*.[56] In *Roth*, the Supreme Court addressed the interplay of a California obscenity statute and the predecessor federal provision to 39 U.S.C. § 3008 which prohibited pandering advertisements. *Roth* reconciled the state and federal interests by recognizing that the "federal statute deals only with actual mailing," whereas the state interest addressed the underlying activity of selling and distributing obscene material.[57]

---

[53] *Conte & Company, Inc. v. Stephan*, 713 F. Supp. 1382, 1386 (D. Kan. 1989) (upholding state consumer protection act).
[54] *State ex inf. Danforth v. Reader's Digest Assoc., Inc.*, 527 S.W.2d 355, 361 (Mo. 1975) (upholding state lottery laws).
[55] *State ex inf. Danforth v. Reader's Digest Assoc., Inc.*, 527 S.W.2d 355, 361 (Mo. 1975) (upholding state lottery laws); *see also Washington v. Reader's Digest Assoc., Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972), appeal dismissed, 411 U.S. 945 (1973) (same)(citing and quoting *Danforth*); *Conte & Company, Inc. v. Stephan*, 713 F. Supp. 1382, 1386 (D. Kan. 1989) (upholding state consumer protection act); *see also Roth v. United States*, 354 U.S. 476, 493-94 (1957)) (upholding state law prohibiting fraudulent advertising via the mails); *Syndicated Publications, Inc. v. Montgomery County, Maryland*, 921 F. Supp. 1442, 1448 (S.D. Md. 1996) (state protection against fraud and unfair business practices); *Commonwealth v. National Federation of the Blind*, 335 A.2d 832, 838 (Pa. 1975)(state protection against fraudulent and deceptive charitable solicitations).
[56] 354 U.S. 476 (1957).
[57] 354 U.S. at 494.

The critical distinction recognized by these cases is between the federal power to regulate mail matter and the state power to regulate the underlying consumer protection or public welfare interest.[58] In other words, the courts in these cases addressed the question of whether Congress sought to preempt the states from enacting consumer protection and public welfare measures, not whether Congress preempted state "mailability" laws.

The essential nature of this distinction is borne out in the fact that there is not a single case in which a court has upheld direct state regulation of the mail as mail. Instead, in every instance, the state has asserted a right to regulate a legitimate consumer protection or public welfare interest. State "do not mail" laws fail because the states are seeking to regulate mail matter as mail matter.

3. Congress Also Has Specifically Recognized Certain State Consumer Protection and Public Welfare Interests

Following the lead of existing decisional law, Congress expressly stated in the Deceptive Mail Prevention and Enforcement Act of 1999 that the federal regulation of deceptive or fraudulent mailings does not preempt state interests in regulating consumer protection and public welfare interests.[59] Congress acted in 1999 to remedy the fact that no existing federal provisions governing mail matter specifically referenced fraudulent sweepstakes mailings.[60] The Deceptive Mail Prevention and Enforcement Act of 1999 sought to address and clarify the law with respect to concerns expressed by states regarding unfair trade practices and fraud perpetrated through the mails as they pertained to lotteries and sweepstakes.[61] Notwithstanding the establishment of comprehensive federal mailability standards for skill contests and sweepstakes, the Deceptive Mail Prevention and Enforcement Act of 1999 specifically provided that it did not preempt state laws that seek to regulate the same underlying consumer protection and public welfare interests.[62]

---

[58] *See State v. McHorse*, 17 P.2d 75, 79 (N.M. App. 1973)(addressing distribution in violation of controlled substances act)(citing and quoting *Rose v. State*, 62 S.E. 117 (1908)(holding that "the state may punish a crime committed through the mails as a medium, without in any sense impinging the undoubted right of the national government to control the mails.")).

[59] *See* Deceptive Mail Prevention and Enforcement Act, Pub. L. 106-168, § 109, 113 Stat. 1806 (1999), *codified at* 39 U.S.C. § 3017.

[60] S. Rep. 106-102 (Jul. 1, 1999), at 5.

[61] *See e.g., Conte*, 713 F. Supp. at 1386; *Danforth*, 527 S.W.2d at 362.

[62] *See* Pub. L. 106-168, § 109, 113 Stat. 1806, 1816 (1999).

> (a) IN GENERAL- Nothing in the provisions of this title (including the amendments made by this title) or in the regulations promulgated under such provisions shall be construed to preempt any provision of State or local law that imposes more restrictive requirements, regulations, damages, costs, or penalties. No determination by the Postal Service that any particular piece of mail or class of mail is in compliance with such provisions of this title shall be construed to preempt any provision of State or local law.
>
> (b) EFFECT ON STATE COURT PROCEEDINGS- Nothing contained in this section shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State or any specific civil or criminal statute of such State.

In so doing, Congress recognized the very same distinction that courts have repeatedly recognized: the distinction between the regulation of mail matter as mail matter and the regulation of some underlying consumer protection or public welfare interest. Accordingly, Congress specifically noted that it was recognizing the traditional state authority to "impose and enforce laws . . . on the basis of an alleged violation of any civil or criminal statute of such a state,"[63] as distinct from the exclusive federal power to determine "mailability."

CONCLUSION

For all of the reasons discussed above, control of the mails and the postal system is reserved to the federal government. The comprehensive and pervasive scheme of federal law governing "mailability" is intended to occupy the field of regulation of nonmailable matter. While the power of a state to regulate activities traditionally reserved to the state police powers (e.g., the enforcement of legitimate public health, safety and welfare concerns including fraud, unfair trade practices, and public morals) that are carried out through the mails has been recognized by the courts, no court decision has recognized the power of a state to regulate mail as mail. In fact, the courts have consistently recognized a distinction between the state regulation of the underlying activity being carried out through the mails, and the general federal control of the mails and the postal system. Because state "do not mail" initiatives seek to directly regulate mail *qua* mail, by prohibiting a commercial mailer from mailing materials otherwise permitted under federal law, these initiatives offend the Postal Service's overall mandate regarding the delivery of business correspondence and the pervasive federal regulation of mailable matter. Accordingly, these state "do not mail" initiatives, if enacted, would be preempted by federal law.

# # #

Section 101 provides that "[t]his title may be cited as the "Deceptive Mail Prevention and Enforcement Act." 113 Stat. 1806.

[63] *Id.*, at 29.